EARLINE SMITH DOWNS,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 95-76-A
ACTING MUSKOGEE AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	February 23, 1996

This is an appeal from a January 5, 1995, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), denying a request for gift conveyance of an interest in an allotment known as the Maria Christiana allotment, Miami No. 35, in Miami County, Kansas. For the reasons discussed below, the Board affirms the Area Director's decision.

The Maria Christiana allotment presently consists of 35 acres and is owned by the Indian heirs of the original allottee in restricted fee status. 1/ Appellant Earline Smith Downs, one of the Indian heirs, holds an undivided 16.4592 percent interest in the allotment. By application dated November 4, 1993, she sought to gift convey a one percent interest in the allotment to the Miami Tribe of Oklahoma (Tribe), retaining a 15.4592 percent interest in herself. Appellant's application stated that she had applied for membership in the Tribe 2/ but gave no other reason for her wish to give part of her interest to the Tribe.

1/ The allotment originally consisted of 200 acres, more or less. With the approval of the Secretary, 120 acres were sold in the late 19th century. In 1989, the remaining 80 acres were partitioned in the United States District Court for the District of Kansas, pursuant to the Act of Oct. 15, 1982, P.L. 97-344, 96 Stat. 1645. 45 acres were partitioned to Midwest Investment Properties, Inc., on a claim of adverse possession to ownership of the unrestricted interests in the allotment, and 35 acres were partitioned to the Indian heirs of the original allottee. Midwest Investment Properties, Inc. v. DeRome, No. 86-2497-0 (D. Kan. May 3, 1989). Under the 1982 statute, the Indian heirs received their interests in restricted fee status.

2/ The record indicates that appellant was ineligible for membership in the Tribe. It also indicates that, at the time of the Area Director's decision, a revision of the Tribe's constitution had been proposed but had not been approved by BIA or voted upon by the tribal membership. Under the proposed revision, appellant would become eligible for tribal membership.

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On July 15, 1994, the Tribe adopted a resolution stating:

> BE IT RESOLVED that the Miami Tribe accepts the transfer of one per cent (1%) of undivided interest on Maria Christiana Reserve Miami #35 from Mrs. Earline Smith Downs;
>
> THEREBY, BE IT FURTHER RESOLVED that this transfer shall be a trust-to-trust transfer with the date of tribal ownership being that of the original Treaty with the Tribe of Miami in 1840;
>
> THEREBY, BE IT FURTHER RESOLVED that if this transfer is deemed to establish any other date or [sic] trust status, the final transfer is not to be approved. [3/]

(Tribe's Resolution 94-44, July 15, 1994).

On December 2, 1994, appellant's application for gift conveyance, together with documents related thereto, was forwarded to the Area Director by the Superintendent, Miami Agency, BIA. Observing that the issues surrounding the application were complex, the Superintendent made no recommendation as to whether or not the application should be approved.

In his January 5, 1995, decision, the Area Director stated:

> Gift conveyances between Indians is a two-part transaction consisting of a disposal by the grantor and an acquisition by the grantee. The disposal portion is considered under the regulations of 25 CFR 152. The acquisition portion of the transaction is governed by 25 CFR 151 - Land Acquisitions. The conveyance of restricted land by gift is authorized by 25 CFR 152.23 - Applications for sale, exchange or gift, and § 152.25 (d) - Gifts and conveyances for less than the appraised fair market value, which provides for gift conveyances when the prospective grantee is the Indian owner's spouse, brother, sister, lineal ancestor or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.

3/ The record shows that the Tribe imposed these conditions upon its acceptance in an attempt to avoid the constraints of section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719 (1994). BIA concluded that a trust-to-trust transfer could not be accomplished because appellant's interest is presently in restricted fee rather than trust status. BIA concluded further that, if the Tribe were to acquire a trust interest in the Maria Christiana allotment by gift conveyance, the acquisition would have to be made under authority of 25 U.S.C. § 465 (1994).

All further references to the United States Code are to the 1994 edition.

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> In considering applications for disposals, the Bureau is charged with the responsibility to assure that the rights of the individual landowners are protected and that it is in their long-range best interest to dispose of their land or interests in the land. My review of your application reveals that the proposed conveyance is not to authorized family members and I cannot justify that a special relationship or circumstance exists between you and the Tribe which would warrant approval of the conveyance. More importantly, I cannot justify your disposing of a portion of your undivided interest in the allotment as being in either your or the other Indian landowners best interest. I find that I can neither recommend the conveyance from a practical land management standpoint, nor as a sound estate planning strategy. [4/] Giving only a portion of your undivided interest is also not consistent with Federal policy and law on managing the further fractionation of individually owned Indian lands. The real and potential consequences from the further fractionation of the ownership interests and introduction of a tribal ownership interest into the tract present very significant tract management issues which would affect not only you, but the other owners as well.
>
> Furthermore, while I can understand your stated desire to give your interest to the Tribe, this proposed transaction is obviously not a conveyance without compensation. This and other aspects of the proposed transaction cause me concern over the propriety of the proposed transaction; therefore, based on my review, I have determined that the proposed gift conveyance to the Miami Tribe is not in the long-range best interest of either you or the other Indian owners of the allotment and does not meet the requirements of 25 CFR 152.25(d).

(Area Director's Jan. 5, 1995, Decision at 2).

Appellant contends that the Area Director's decision is in conflict with current Federal Indian policy, as expressed in the Indian Self-Determination Act of 1974, 25 U.S.C. §§ 450-450n, a statute which, according to appellant, "recogniz[es] the right of tribes and members of tribes to exercise wide latitude with respect to their trust property consistent with basic trust responsibilities" (Appellant's Opening Brief at 5). Appellant also contends that the Area Director erred in determining that she does not have a special relationship with the Tribe. Further, she contends that the Area Director's concern about further fractionation of ownership and potential management problems "disclose[] a complete ignorance * * * of the current policy of the United States with respect to dealing with the problem

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4/ While appellant's application was pending before BIA, BIA staff members were advised by appellant's husband and by an attorney for Butler National Corporation (Butler) that appellant wished to make the gift to the Tribe for estate planning purposes.

Butler, whose role in this matter is discussed further infra, was seeking to assist the Tribe to establish a gaming enterprise on the Maria Christiana allotment.

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of fractionated interests in trust or restricted land" (Id. at 8). Finally, appellant contends that the Area Director erred in finding that the proposed transaction was not a conveyance without compensation.

In Estate of Clifford Celestine v. Acting Portland Area Director, 26 IBIA 220 (1994), the Board described BIA's responsibilities in connection with the approval of gift conveyances of Indian trust or restricted land. The Board there stated:

> In the case of a gift conveyance, it is BIA's duty to ensure that the prospective donor understands and intends the effect of his/her action. It is also BIA's duty to make a careful examination of the circumstances to determine whether the transaction is in the donor's best interest. BIA must refrain from approving a gift deed where there is any question as to the donor's intent or where the facts show the conveyance is not in the donor's best interest. See, e.g., Estate of Evan Gillette, 22 IBIA 133 (1992), aff'd, Gillette v. Babbitt, No. A4-92-134 (D.N.D. Oct. 15, 1993), aff'd, No. 93-3769 (8th Cir. May 19, 1994).

26 IBIA at 228. In Celestine, BIA had approved a gift deed which was later challenged on the grounds that the donor had been subjected to undue influence and that, despite the clear language of the gift deed, he had expected to be compensated for his conveyance. The facts of Celestine demonstrate what can happen when BIA fails to make a careful examination of the circumstances surrounding a request for gift conveyance.

While a careful pre-approval examination is required, however, the actual determination of whether or not to approve a proposed gift conveyance is a matter within the discretion of BIA. Thus, as in the case of other BIA discretionary decisions, the Board's role here is to determine whether BIA has given proper consideration to all legal prerequisites to the exercise of discretion. If it has, and if there is support for its decision in the record, the Board will not substitute its judgment for BIA's. Cf. Davis v. Acting Aberdeen Area Director, 27 IBIA 281 (1995) (partition of trust land); Blackhawk v. Billings Area Director, 24 IBIA 275 (1993) (lease of trust land).

Here, it is apparent that the Area Director has made a careful examination of the circumstances surrounding appellant's gift conveyance request. The record includes a detailed memorandum prepared by the Area Supervisory Realty Specialist and concurred in by the Area Director. This memorandum, dated January 5, 1995, provides further background and analysis supporting the Area Director's decision. Other materials in the record also support the decision.

As evident in his decision and the memorandum in which he concurred, the Area Director found that BIA management of the tract was already difficult because of the distance of the tract from BIA locations and from other trust or restricted land and that it would become more difficult with the further fractionation of ownership and the addition of the Tribe as an owner. The memorandum states, inter alia, that, where tribes own small interests in allotted lands, the tribes and the individual owners often

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have competing interests in the use of the land. The memorandum also states that, although the Tribe has hopes of establishing a gaming enterprise on the land, which would presumably benefit all the owners financially, this plan is speculative at present. The BIA appraisal of the tract, prepared in November 1994, shows its highest and best use to be agricultural.

The Area Director's conclusions concerning the likely increase in management problems were clearly based on BIA experience in this area, as was his conclusion that such problems would probably work to the detriment of appellant and the other landowners. The Board finds that the Area Director's analysis supports his conclusion that the transfer would not be in appellant's best interest. The Board will therefore not disturb the Area Director's finding in this regard.

The Area Director also found that appellant did not have a special relationship with the Tribe within the meaning of 25 CFR 152.25 (d). Section 152.25(d) authorizes, inter alia, approval of gift conveyances, in the case of a special relationship or special circumstances which "in the opinion of the Secretary warrant approval of the conveyance." 5/ Under this provision, BIA is authorized to, and does, exercise discretion in determining whether a particular relationship is a special relationship warranting approval of a gift conveyance.

Appellant was not a member of the Tribe and was not eligible for membership in the Tribe. The Board finds that, under these circumstances, it was not unreasonable for the Area Director to determine that appellant's relationship with the Tribe was not a special relationship warranting approval of this gift conveyance. Thus, it will not disturb the Area Director's determination that no such special relationship existed in this case.

The Area Director also found that the proposed conveyance of only a small portion of appellant's interest was in conflict with Federal policy concerning fractionation of interests in allotted lands. Appellant disputes this finding, contending that the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2201, encourages tribal purchase of fractionated interests. Even assuming that appellant had applied to sell rather than give a portion of her interest to the Tribe, the policy expressed in ILCA would not favor approval of the transaction. The purpose of the tribal purchase provisions in ILCA is to promote consolidation of existing fractional interests, not to create new fractional interests for tribes to purchase.

5/ 25 CFR 152.25(d) provides in full:

"Gifts and conveyances for less than the appraised fair market value. With the approval of the Secretary, Indian owners may convey trust or restricted land, for less than the appraised fair market value or for no consideration when the prospective grantee is the owner's spouse, brother, sister, lineal ancestor of Indian blood or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance."

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Finally, appellant contends that the Area Director erred in finding that her proposed conveyance was not one without compensation. She argues that "[i]t is clear from the record that absolutely no consideration passes to [appellant] to make this gift to the tribe" (Appellant's Opening Brief at 10-11). The Board finds no specific evidence in the record that appellant expected to he compensated for her conveyance. However, the absence of such evidence is not, as appellant appears to contend, conclusive proof that no consideration would pass to appellant or that appellant understood this to be the case. As is evident from Celestine, it is possible for an Indian landowner to apply for a gift conveyance without fully understanding the import of the action and/or in the belief that he/she will be compensated for the conveyance through some form of side agreement not revealed to BIA.

While the Area Director may have overstated the case in saying that the transaction was obviously not a conveyance without compensation, the record reflects clear cause for concern that the transaction might not be as represented. 6/ Were this the only problem with the transaction, it might have been appropriate for BIA to undertake further investigation on this point. However, given the problems discussed above, such an investigation would have been a waste of time. The Area Director's decision is fully supported by his other reasons for denial discussed above.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's January 5, 1995, decision is affirmed.

_____
Anita Vogt
Administrative Judge

_____
Kathryn A. Lynn
Chief Administrative Judge

6/ It is apparent that BIA was very concerned about the role of Butler in this proposed conveyance and, in particular, with attempts by Butler attorneys, in various contacts with BIA, to represent appellant as well as the Tribe and Butler. The record shows that BIA and the Field Solicitor refused to allow Butler attorneys to represent appellant and other heirs in at least one meeting. The record also shows, however, that Butler attorneys continued to contact BIA, purportedly on behalf of appellant, after that meeting. The Jan. 5, 1995, memorandum expresses strong concern, not only about the appearance of conflict of interest on the part of the Butler attorneys, but even about the possibility of a violation of 25 U.S.C. § 202, a statute making it unlawful to induce an Indian to convey interests in trust lands.

The Board notes that, upon reviewing the record preparatory to issuing this decision, it learned that the attorney representing appellant in this appeal was, on July 22, 1993, a consultant to Butler.

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